

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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R. PROVINO,

Plaintiff,

v.

JAUN TREY MENDEZ,

Defendants.

Case No. 3:21-CV-00462-MMD-CLB

**REPORT AND RECOMMENDATION OF
U.S. MAGISTRATE JUDGE¹**

[ECF No. 1]

Before the Court is Plaintiff R. Provino's ("Provino"), application to proceed *in forma pauperis* (ECF No. 1), and his *pro se* civil rights complaint (ECF No. 1-1). For the reasons stated below, the Court recommends that Provino's *in forma pauperis* application, (ECF No. 1), be granted, and his complaint, (ECF No. 1-1), be dismissed, with prejudice.

I. IN FORMA PAUPERIS APPLICATION

A person may be granted permission to proceed *in forma pauperis* ("IFP") if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

The Local Rules of Practice for the District of Nevada provide: "Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The application must be made on the form provided by the court and must include a financial affidavit disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

¹ This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 “[T]he supporting affidavit [must] state the facts as to [the] affiant’s poverty with
2 some particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th
3 Cir. 1981) (quotation marks and citation omitted). A litigant need not “be absolutely
4 destitute to enjoy the benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*,
5 335 U.S. 331, 339 (1948).

6 A review of the application to proceed IFP reveals Provino cannot pay the filing
7 fee; therefore, the Court recommends that the application, (ECF No. 1), be granted.

8 **II. SCREENING STANDARD**

9 Prior to ordering service on any Defendant, the Court is required to screen an *in*
10 *forma pauperis* complaint to determine whether dismissal is appropriate under certain
11 circumstances. See *Lopez*, 203 F.3d at 1126 (noting the *in forma pauperis* statute at 28
12 U.S.C. § 1915(e)(2) requires a district court to dismiss an *in forma pauperis* complaint for
13 the enumerated reasons). Such screening is required before a litigation proceeding *in*
14 *forma pauperis* may proceed to serve a pleading. *Glick v. Edwards*, 803 F.3d 505, 507
15 (9th Cir. 2015).

16 “[T]he court shall dismiss the case at any time if the court determines that – (A) the
17 allegations of poverty is untrue; or (B) the action or appeal – (i) is frivolous or malicious;
18 (ii) fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief
19 against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(A), (B)(i)-
20 (iii).

21 Dismissal of a complaint for failure to state a claim upon which relief may be
22 granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. §
23 1915(e)(2)(B)(ii) tracks that language. When reviewing the adequacy of a complaint under
24 this statute, the court applies the same standard as is applied under Rule 12(b)(6). See,
25 e.g., *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) (“The standard for
26 determining whether a plaintiff has failed to state a claim upon which relief can be granted
27 under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of Civil Procedure 12(b)(6)
28 standard for failure to state a claim.”). Review under Rule 12(b)(6) is essentially a ruling

1 on a question of law. See *Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir.
2 2000) (citation omitted).

3 The Court must accept as true the allegations, construe the pleadings in the light
4 most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v.*
5 *McKeithen*, 395 U.S. 411, 421 (1969) (citations omitted). Allegations in *pro se* complaints
6 are "held to less stringent standards than formal pleadings drafted by lawyers[.]" *Hughes*
7 *v. Rowe*, 449 U.S. 5, 9 (1980) (internal quotations marks and citation omitted).

8 A complaint must contain more than a "formulaic recitation of the elements of a
9 cause of actions," it must contain factual allegations sufficient to "raise a right to relief
10 above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
11 "The pleading must contain something more. . . than. . . a statement of facts that merely
12 creates a suspicion [of] a legally cognizable right of action." *Id.* (citation and quotation
13 marks omitted). At a minimum, a plaintiff should include "enough facts to state a claim to
14 relief that is plausible on its face." *Id.* at 570; see also *Ashcroft v. Iqbal*, 556 U.S. 662, 678
15 (2009).

16 A dismissal should not be without leave to amend unless it is clear from the face
17 of the complaint the action is frivolous and could not be amended to state a federal claim,
18 or the district court lacks subject matter jurisdiction over the action. See *Cato v. United*
19 *States*, 70 F.3d 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th
20 Cir. 1990).

21 **III. SCREENING OF COMPLAINT**

22 Provino brings this action pursuant to 28 U.S.C. § 1331 and § 1332 against
23 Defendant Jaun Trey Mendez, III, P.C., who is an attorney in Texas. (ECF No. 1-1.) As
24 the basis for jurisdiction Provino states only the following: "Federal treaty, discrimination,
25 torture, cruel & unusual punishment, mistreatment of blind." (*Id.* at 3.) Provino's complaint
26 does not provide any allegations. (*Id.* at 4.) Provino seeks \$100 million dollars of relief.
27 (*Id.*)

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1 Even construing the allegations of Provino's complaint liberally, the Court cannot
2 conceive or construe any specific set of circumstances under which these conclusionary
3 statements would give rise to any federal constitutional or statutory right. The allegations
4 are vague and confusing, such that the Court cannot discern any claim. Simply put,
5 Provino's allegations do not meet the threshold standard of plausibility required by
6 *Twombly*. Therefore, the action should be dismissed with prejudice. Leave to amend is
7 not appropriate because the deficiencies in Provino's complaint cannot be cured by
8 amendment. See *Cato*, 70 F.3d at 1106.

9 **IV. CONCLUSION**

10 Consistent with the above, the Court recommends that dismissal is warranted
11 under 28 U.S.C. § 1915(e)(2)(B)(ii). Because amendment would be futile, the dismissal
12 should be with prejudice. See *Cato*, 70 F.3d at 1106.

13 The parties are advised:

14 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
15 Practice, the parties may file specific written objections to this Report and
16 Recommendation within fourteen days of receipt. These objections should be entitled
17 "Objections to Magistrate Judge's Report and Recommendation" and should be
18 accompanied by points and authorities for consideration by the District Court.

19 2. This Report and Recommendation is not an appealable order and any
20 notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the
21 District Court's judgment.

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1 **V. RECOMMENDATION**

2 **IT IS THEREFORE RECOMMENDED** that Provino's application to proceed *in*
3 *forma pauperis*, (ECF No. 1), be **GRANTED**;

4 **IT IS FURTHER RECOMMENDED** that the Clerk **FILE** the complaint, (ECF No. 1-
5 1);

6 **IT IS FURTHER RECOMMENDED** that Provino's complaint, (ECF No. 1-1), be
7 **DISMISSED, WITH PREJUDICE**; and,

8 **IT IS FURTHER RECOMMENDED** that this action be **CLOSED**, and that judgment
9 be entered accordingly.

10 **DATED:** November 9, 2021.

11 
12 **UNITED STATES MAGISTRATE JUDGE**